Supreme Court
of the
United States

OCTOBER TERM, 1972

No. 72-671

CECILIA ESPINOZA and RUDOLFO ESPINOZA,
Petitioners,

v.

FARAH MANUFACTURING CO., INC.,
Respondent.

BRIEF FOR PETITIONER

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CITATION TO OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas, granting plaintiff's motion for summary judgment, is reported in 343 F.Supp. 1205, and appears in the Petition for Writ of Certiorari, at p. 10a. The opinion of the Fifth Circuit Court of Appeals and its denial of the petition for rehearing are reported in 462 F.2d 1331 and appear in the Petition for Writ of Certiorari, at p. 1a.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on May 31, 1972. Petitions for rehearing and for rehearing en banc were denied on July 21, 1972. On October 11, Mr. Justice Powell extended the time for filing a petition for certiorari to and including October 31, 1972. The Petition for Writ of Certiorari was filed on October 31, 1972. The writ was granted by order of the Court dated April 23, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

1. The principle, federal statute to be construed is §703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1), which provides:

> "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

Other relevant statutory provisions are quoted in full in the text of the brief.

2. The regulation involved is an Equal Employment Opportunity Commission guideline on discrimination because of national origin, 29 C.F.R. §1606.1(d). This regulation provides:

"Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in the country may not be discriminated against on the basis of his citizenship, except that it is not an unlawful employment practice for an employer, pursuant to section 703(g), to refuse to employ any person who does not fulfill the requirements imposed in the interests of national security pursuant to any statute of the United States or any Executive Order of the President respecting the particular position or the particular premises in question."

QUESTION PRESENTED

Whether an employer's admitted policy of excluding resident aliens from employment constitutes a violation of the prohibition against discrimination on the basis of national origin contained in Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a) and its statutory antecedents.

STATEMENT

This is an action brought by a lawfully admitted resident alien who was denied employment because she is not a United States citizen.

The Petitioner Mrs. Cecilia Espinoza lives in San Antonio, Texas with her husband, a United States citizen. Respondent Farah Manufacturing Co., is a clothing manufacturer. On or about July 19, 1967, the Petitioner ap-

plied for employment at Respondent's San Antonio plant. The Respondent refused to consider her application solely because she is not a United States citizen. It is Farah's policy to reject aliens "regardless of education, previous work experience or health qualifications." None of the above stated facts are disputed. Jt. App. 37, 49, 74-76, 79-80.

After filing a charge of discrimination with the Equal Employment Opportunity Commission and receiving a Notice of Right to Sue (29 C.F.R. §1601.25a(d)), Mrs. Espinoza brought this civil action. The Regional Director of the EEOC issued Findings of Fact indicating that the Respondent's policy has been to reject non-citizen applicants, that the policy is unwritten, that no reason was given for the existence of this policy, that an exception to the policy has been made on one occasion, that there is no national security justification for the policy and that Farah's refusal to hire Petitioner resulted from this policy. Jt. App. 28-30.

The District Court granted Petitioner's Motion for a Summary Judgment, holding that Respondent Farah Manufacturing Company's admitted policy of refusing to hire resident aliens constituted discrimination on the basis of national origin as prohibited by Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a). On appeal, the Court of Appeals for the Fifth Circuit reversed.

SUMMARY OF ARGUMENT

This case is of critical importance in determining whether a highly vulnerable minority, which has been the traditional object of employment discrimination, will be protected by Title VII. The group is resident aliens, who the Farah Manufacturing Company flatly refuses to hire regardless of individual qualifications or abilities.

Farah concedes that there is no business justification as such for its anti-alien policy, but claims that it is nonetheless outside the reach of Title VII because Title VII does not expressly cover discrimination on grounds of citizenship. Judged under the standards of Griggs v. Duke Power Co., 401 U.S. 424 (1971), however, it is clear that Farah's policy is barred by the provision in Title VII which prohibits discrimination on grounds of national origin.

First, Farah's policy imposes a special burden on persons of foreign birth. They, and they alone, must undergo the rigors of obtaining citizenship in order to qualify for employment. Native born persons are exempted from this burden by the fortuity of birth. It is a form of national origin discrimination to create special, non-job related, employment hurdles for persons merely because they are born abroad.

Second, the inevitable effect of Farah's policy is to prefer some ethnic groups over others. The groups preferred are those which have been in the country the longest and have become most thoroughly established in American society. For such established groups, the citizenship requirement has little significance. The groups bur-

dened are those with a significant number of new immigrants who have not yet fully moved into the mainstream. In San Antonio, of course, Spanish language groups, most notably Mexicans, are the primary objects of an anti-alien policy. They are also among the poorest and most vulnerable groups in the community.

An abundant body of law and precedent supports the conclusion that Title VII bars alienage discrimination. The Equal Employment Opportunity Commission's regulations expressly state that alienage discrimination is to be considered national origin discrimination under Title VII. 29 C.F.R. §1606.1(d).

Moreover, the long established Congressional policy dating back to reconstruction civil rights legislation, is to protect aliens against private employment discrimination. This reconstruction legislation is now embodied in 42 U.S.C. §1981. It has, since the 1968 Supreme Court decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, become established as a companion fair employment statute to Title VII, and it expressly protects against alienage discrimination. Title VII should also be construed to cover alienage discrimination for reasons of consistency and to offer maximum opportunity for complainants to avail themselves of the more fully articulated Title VII procedures. If Title VII is not so construed, petitioner should be granted the relief sought under the independent authority of §1981.

Recent decisions of this Court, particularly Graham v. Richardson, 403 U.S. 365 (1971), and Congressional immigration legislation provide further support for interpreting Title VII to bar alienage discrimination.

INTRODUCTION

The issue posed by this case is relatively simple and straightforward: yet it will have a major impact in determining whether a key minority group will be given the protection which Title VII offers. This minority group is resident aliens. The history of these aliens — Irish, Chinese, Italian, Jew and Mexican alike — has been a history of discrimination and in particular, job discrimination.

The warning "None need apply but Americans" in Boston newspapers of the mid-1800's[1] was not an isolated event in American history.

> "For want of alternative, the immigrants [during the late 1800's] took the lowest places in the ranks of industry. They suffered in consequence from the poor pay and miserable working conditions characteristic of the sweatshops and the homework in the garment trades and in cigar making. But they were undoubtedly better off than the Irish and Germans of the 1840's for whom there had been no place at all."
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> "Escape from the ranks of unskilled labor was, however, not easy and became steadily more difficult. The want of skill and capital was always a handicap. *But, in addition, discrimination against the newer ethnic groups grew even more intense, especially after the turn of the century.*"[2]

[1] O. Handlin, Boston's Immigrants 62 (1959)

[2] O. Handlin, The Newcomers 24 (1959) (Emphasis added.)

This, then, was a continuing pattern in the treatment of aliens. The massive forty-two volume report of the 1911 Congressional Immigration Commission documents the occupational disadvantage of the foreign born,[3] and the particularly bad situation of Mexican aliens.[4] A 1928 survey of the employment practices in five large branches of industry revealed sweeping discrimination against aliens. Of two million positions surveyed, more than one million two hundred thousand were closed to aliens regardless of their qualifications.[5] These findings were confirmed in a contemporaneous survey of 400 business leaders (members of President Hoover's Economic Commission) which showed an overwhelming preponderance of opinion favoring citizens as against aliens in industry and a common belief that the demand for citizenship was quite usual.[6] Organized labor contributed to this situation. A survey of fifty labor unions revealed that unions with almost three-fourths of total union membership imposed a citizenship requirement.[7] With the coming of the depression, aliens found their situation even worse; discrimination against them increased as the job market tightened.[8] In the period of national defense production which followed, the situation intensified. Companies such as the Chrysler Corporation required citizenship statements as a condition of employment despite the fact that

[3]Report of the Immigration Commission, 61st Cong. 3d Sess., Sen. Doc. No. 747, at Vol XIX, p. 209, Table 74 (1911).

[4]Id at Vol. I.

[5]H. Fields, Unemployment and the Alien, 30 South Atlantic Quarterly 60, 62 (1931).

[6]Id. at 76.

[7]Id. at 68.

[8]H. Fields, The Unemployed Foreign-Born, 49 Quarterly Journal of Economics 533 (1935).

the law in most cases imposed no such requirement.[9] The Bureau of Employment Security reported in January, 1941 that employers had generally gone far beyond legal requirements in limiting employment to citizens. The situation was especially bad in those areas with the largest concentration of aliens.[10]

This exploitation of and discrimination against aliens dissipated when their children, the second and succeeding native born generations, reached the employment market. The 1911 Immigration Commission Report documents the fact that for each occupational group the native born were paid more than were the foreign born.[11] Other studies have shown that the longer a person has been in the United States the higher will be his earnings.[12] By 1969, employment discrimination against the old ethnic groups had

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[9]E. Rubin, Unemployment of Aliens in the United States—1940, at 21-21 (Unpublished Ph.D. dissertation on file at Columbia Univ. 1949).

[10]Ibid. Specific case studies paint an even more vivid picture of alien exploitation than is suggested by the gross statistics. The 1911 Immigration Commission Report and studies of scholars tell of the labor agencies which controlled immigrant labor. The story is one of exorbitant fees and commissions, extortion of bribes by foremen, calculated separation of men from their families, and cheating of the poor and uneducated even in little details such as charging transportation fees to a job when the transportation had been provided free. E. Abbott, Immigration Select Documents and Case Records 475-476 (1924). See G. Abbott, The Chicago Employment Agency and the Immigrant Worker, 14 Am. J. of Soc. 292 (1908).

[11]Report of the Immigration Comm., *supra* note 4, at Vol. I, p. 394, Table 42, p. 401, Table 48.

[12]D. Cole, Immigrant City 121 (1963); R. Higgs, Race, Skills & Earnings; American Immigrant in 1909, 131 J. of Econ. History 420 (1971); A. Eckler & J. Zoltnick, Immigration and the Labor Force, 262 Annals of Amer. Acad. of Pol. and Soc. Sci. 92, 97-99, 101 (1949).

virtually ceased. The average earnings of all European ethnic groups was essentially the same.[13] Not that any of this needs to be documented. The generally poor treatment of alien groups and the eventual assimilation of succeeding generations is a judicially noticeable fact of American history.

The practice at Farah Manufacturing Co. is a current manifestation of this established pattern. The company will not hire immigrants unless and until they become citizens. As the company puts it, they refuse to hire aliens "regardless of education, previous work experience, or health qualifications." Jt. App. 49. There is no business justification whatsoever for this blanket policy. The company has never in these proceedings attempted to justify the policy in any way, business or otherwise, or to show that it benefits anyone at all. Indeed the Fifth Circuit virtually conceded that the policy was arbitrary in terms of business needs.[14] Farah's policy

[13]The median family income of persons as of November, 1969, self-classified by ethnic group, was as follows:

English	$8,324	Polish	8,849
German	8,607	Russian	11,554
Irish	8,127	(predominately Jewish)	
Italian	8,808	Spanish	5,641

U.S. Bureau of the Census, Current Population Reports, Characteristics of the Population by Ethnic Origin, November, 1969, Series P-20, No. 221 (1971).

[14]"Quite obviously, a great host of arbitrary and discriminatory employment practices, far too numerous to mention, remain unchecked and unhampered by the Act. We hold that refusal to hire non-citizens is one of them." 462 F.2d at 1334.

[15]This concept of national origin goes beyond the usual practices of U.S. Bureau of the Census. The Census Bureau collects and reports data on "national origins" only for persons who are foreign born themselves or who have one or more foreign born parents, *i.e.*, the first and second generations in the United States. See U.S. Bureau of the Census, U.S. Census of Population: 1970, Detailed Characteristics,

is plainly and simply an overt, arbitrary and wholly unjustified discrimination against aliens.

Nor does this case have anything to do with the employment of the so-called "commuter aliens" who are recruited from across the border for temporary employment. These commuters and their employment is specially regulated by the Department of Labor. The petitioner here is not a commuter. She is a lawfully admitted permanent resident alien. Jt. App. 74, 83. She is married to an American citizen and has expressed the desire to become a citizen herself when she can acquire the necessary language skills and education. Jt. App. 76, 77-78. Persons in her status are fully subject to all United States laws and taxes including the military draft.

Thus, the issue in this case comes down to this. Should Title VII, with its broad prohibitions against employment discrimination, including "national origin discrimination," be read to permit continuation of this arbitrary discrimination against a notoriously vulnerable and oppressed minority group? The Fifth Circuit interpreted the phrase "national origin" to cover only discrimination against entire ethnic groups, citizen and noncitizen alike, and, as such, it did not protect against alienage discrimination. That is the interpretation urged by respondent Farah

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Texas, Series PC(1)-D45, at Table 141; U.S. Census of Population; 1960, Nativity and Parentage, Report PC(2)-1A (1965). By the time the third generation is reached, the concept of national origin is ignored for census purposes. In one special study (separate from the Dicennial Census) conducted recently, the Census Bureau for the first time did examine ancestry dating back several generations, but this was reported as a study of "ethnic" origins, not "national" origins. See study cited in note 13, supra. Thus the Census Bureau draws a distinction between ethnic origin and national origin which the Fifth Circuit has blurred over.

here. But neither respondent Farah nor the court below could advance any reason other than a simple, one-sided reading of some rather ambiguous statutory words, why the statute should be so narrowly read, nor could they point to any clear legislative history calling for such a reading, or any statutory purpose or policy which would be served by such a reading. As we shall show, quite the contrary is true. All these factors, as well as the precedents established in related cases before this Court and Equal Employment Opportunity Commission guidelines, support an interpretation of the statute to protect aliens.

I

ALIENAGE DISCRIMINATION VIOLATES TITLE VII BECAUSE IT INVOLVES THE PURPOSEFUL IMPOSITION OF SPECIAL BURDENS ON PERSONS OF FOREIGN BIRTH.

The Fifth Circuit erred in limiting national origin to "ethnic," or "ancestry," discrimination. National origin discrimination includes that, of course, but it is entirely too narrow a reading of the statute to so restrict it. Title VII should rather be read to bar all forms of discrimination based on national origin. Alienage discrimination is simply another variation on the national origin discrimination theme and should be dealt with as such.

Because the Fifth Circuit interpretation of "national origin" looks to ancestry or ethnic background as the sole determinate of a person's national origin, all persons of Italian extraction are presumably "Italians" under this concept regardless of whether they themselves

were born in Italy or whether they had forbears who emigranted from Italy generations ago. Thus an employer who hires some members of this ethnic group may safely refuse to hire others without being accused of national origin discrimination. This concept of national origin takes an entirely unrealistic view of the nature of such discrimination. Blanket discrimination against all persons of a particular ancestry very rarely occurs. The employer who is prejudiced against Italians probably never considers visiting that prejudice upon an entirely assimilated American whose family has been here for generations, even though that person may technically be of Italian "national origin" under the Fifth Circuit interpretation. The simple fact of the matter is that a person's foreign origins become attenuated as he or she develops American roots. Only the foreign born have pure foreign origins; all succeeding generations have mixed foreign and American origins; and at some point the American origins predominate. That is the process of assimilation.

In order to avoid this definitional problem raised by the Fifth Circuit's restricted interpretation, a court must look to the place of an individual's birth, separately from and in addition to his ancestry, in assessing whether national origin discrimination exists. Any discrimination aganst those who have purely foreign origins and in favor of those who are partially American in origin is clearly the kind of discrimination against foreigners which is the essence of "national origin" discrimination. This reference to an individual's birthplace is consistent with the literal meaning of the phrase "national origin"; the *nation* where one is born is where he or she literally originated. Moreover, the nation of an individual's birth has much more to do with the likelihood of discrimination against

him than does the place from which his ancestors came years ago. As noted above, national origin discrimination has traditionally been the concern primarily of new immigrants — the foreign born — for these are the persons most obviously foreign in their name, language, dress and customs.[16]

Viewing national origin in terms of place of birth, there is no doubt that Farah's policy is prohibited. One group and only one — native born Americans — is unharmed by the Farah policy, since all persons in this group are citizens at birth. Persons born in any other nation are subjected to the very serious hurdle of having to become naturalized before they can gain employment. The only thing this burdened group has in common is foreign birth — foreign national origin. Thus, Farah's policy deliberately discriminates against persons of foreign birth as compared to persons of native American birth by imposing an extra burden on them. If an extra employment hurdle were erected for blacks or for Jews this Court would have no difficulty striking it down as a direct and intentional violation of Title VII. The situation should be no different when an extra burden is placed on the foreign born. The essential nature of the action is the same — a class discrimination against a group because of something beyond their control, their place of birth, without regard to individual merit or qualifications.

If the process of naturalization had some relevance to job performance the requirement might possibly be excused. But there is not the remotest relevance. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this Court held certain test and diploma requirements to violate

[16]See pp. 7-10, *supra*.

Title VII because they operated as "built-in headwinds" impeding minority groups from obtaining employment and were unrelated to job capability. These tests and diploma requirements did not bar all Negroes, nor did they bar only Negroes, but their effect was unnecessarily to impede Negroes and other poorly educated groups in obtaining jobs. As the court put it:

> "The Act [Title VII] proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431.

The same reasoning applies to the citizenship requirement imposed by Farah. Indeed, the citizenship requirement is much more offensive because native born Americans are de facto exempted from it by right of birth. The adverse effect is placed solely and exclusively on the foreign born. The citizenship requirement is therefore precisely

> "the kind of 'artificial, arbitrary and unnecessary barrier to employment' which the Court [in Griggs] found to be the intention of Congress to remove." McDonnell Douglas Corp. v. Green, 41 U.S.L.W. 4651, at 4655 (May 15, 1973).

This broader approach to national origin, which takes account of an individual's own foreign birth as well as foreign ancestry is fully supported by the language and legislative history of Title VII. The statute does not

speak of "ethnic origins" or "ancestry", and thus is not on its face limited in the manner suggested by the Fifth Circuit. Nor is it anywhere so limited by committee reports or debate. The only significant definition of "national origin" in legislative history is a brief quote from Representative Roosevelt:

> "May I just make very clear that "national origin" means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country." 110 Cong. Rec. 2548-49 (1964) as quoted by the court below in 462 F.2d at 1333.

The Fifth Circuit apparently laid great emphasis on the reference to "forebears" and concluded that ancestry was the key to national origin. But Representative Roosevelt talked much more about the place where "you" — the person himself rather than his forebears — came from. This of course calls for an examination of place of birth as well as ancestry. This tidbit of legislative history is not conclusive, of course. But to the extent it has any significance at all it supports a dual approach to national origin.

Title VII is a comprehensive attack on employment discrimination in the United States and that attack would be seriously undermined if any forms of arbitrary prejudice such as Farah's were permitted to persist and deny employment to persons who are fully qualified and able. This purpose is best served by a flexible interpretation of national origin which determines discrimination against persons on the basis of the nation where they originate as well as the nation where their forebears originate.

II

ALIENAGE DISCRIMINATION VIOLATES TITLE VII BECAUSE ITS INEVITABLE EFFECT IS TO REDUCE JOB OPPORTUNITY FOR RECENT IMMIGRANT GROUPS IN GENERAL AND FOR SPANISH LANGUAGE GROUPS IN PARTICULAR.

Even if this Court does not decide to define national origin in terms of birth in addition to ancestry, it should be clear that Farah's anti-alien policy is unlawful because of the adverse effect it has on recent immigrant groups in general and on Spanish language groups in particular.

The detrimental effect of a citizenship requirement does not fall equally on all ethnic groups. The citizenship requirement may be, like the requirements in *Griggs*, fair on its face and initially applied to all. But it clearly has the effect of preferring some ethnic and nationality groups over others. The groups preferred are those whose members have lived in the United States longest and who have become most thoroughly assimilated, because such groups will have a relatively small percentage of noncitizens among them. The groups burdened will be those with the heaviest percentage of new immigrants among them. This effect mirrors the traditional pattern of national origin discrimination in the United States—older more established nationality groups discriminating against newer groups.

Of course, a citizenship requirement does not bar employment to all members of any particular nationality,

and some of its adverse impact falls on persons who are members of nationality groups long established here, just as the requirements in *Griggs* were not perfect in excluding blacks and blacks alone. But the effect of a citizenship requirement in preferring established nationalities over new and more vulnerable nationalities is much more direct and obvious than was the effect of Duke's requirements in preferring whites over blacks.

The impact of the anti-alien policy in San Antonio illustrates its invidious nature. The only groups seriously affected by it are Spanish language groups. Of 23,102 resident aliens in the San Antonio area, 17,598 (77%) are Mexicans and another 625 (3%) are from other Spanish speaking nations and likely to be subjected to the same discrimination as Mexicans.[17] In El Paso, where Farah's main office and plant are located, 85% of the alien population is Spanish speaking.[18] No other alien nationality group in either city has more than 943 persons.[19] The Spanish language aliens in San Antonio are 5% of the area's total Spanish language population.[20] The non-Spanish language aliens on the other hand constitute only 1% of the non-Spanish speaking population in the area.[21] Thus, in practice the citizenship require-

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[17]U.S. Bureau of the Census, U.S. Census of Population: 1970, Detailed Characteristics, Texas, Series PC-(1)-D45, at Table 144, p. 45-1306.

[18]Id. p. 45-1304.

[19]The next largest group is 943 United Kingdom nationals in San Antonio. Id. at p. 45-1306.

[20]Id. at p. 45-1306; U.S. Bureau of the Census, Census of Population: 1970, Census Tracts, Final Report PHC(1)-186 San Antonio, Texas SMSA, at Table P-2, p. P-18 (1972).

[21]Ibid.

ment imposed by Farah is essentially a special burden on Spanish speaking groups which has little meaning to any other nationality group.

Not surprisingly, these Spanish language groups are among the poorest and most discriminated against in the nation as a whole and in San Antonio in particular. On a national basis the median income of families of Spanish ethnic background as of 1969 was only two-thirds of that of European ethnic groups.[22] In the San Antonio area as of 1970, the mean household income of Spanish language groups was $6,879 as compared to $10,339 for non-Spanish white households.[23] Twenty-nine percent of all Spanish language families had incomes below the poverty line, while only 7% of the non-Spanish white families fell in this category.[24]

Farah's anti-alien policy is having the same effect in San Antonio that such policies have always had. It is imposing a heavy burden on certain ethnic groups—who are the poorest and most vulnerable—while causing relatively little burden to other ethnic groups. This is surely a violation of the *Griggs* principle.

That is precisely the view which British courts have taken on the same issue. In *Borough of Ealing v. Race Relations Bd.*, (1971) 1 All E.R. 424 (Q.B. Div.), a local rule barring aliens from public housing was challenged as being in violation of the law banning discrimination on

[22]See note 13, supra.

[23]Data derived from U.S. Bureau of the Census, supra note 17, at Table 206, p. 45-2289.

[24]Data derived from U.S. Bureau of the Census, supra note 17, at Table 207, pp. 45-2320, 45-2322.

grounds of national origin. The rule was defended with the same argument advanced by Farah here—that it discriminated on grounds of citizenship, not national origin. The Borough emphasized that when one of the complainants, who had both been Polish nationals, became naturalized he was promptly admitted to eligibility for housing, thus showing that it was not discriminating against Poles as a group. The court ruled, nonetheless, that national origin discrimination had been practiced.

> "In my judgment the practical effect of the Borough's rule is and must be to place . . . in a less favorable position than almost all people of British or Commonwealth origin, the vast majorities of people of other national origins. It is thus, in effect and is all except an insignificant number of cases, a discrimination on the ground of national origins although it is not expressed in those terms." (1971) 1 All E.R. at 434.

Moreover, because a citizenship requirement is arbitrary and unjustified in terms of business needs, it can be arbitrarily waived if any "desirable" alien presents himself for employment. Precisely that has happened in Farah's case. The company admits to having hired an alien, contrary to its professed strict policy, on at least one occasion. Jt. App. 29. It is, of course, a rare case in San Antonio or El Paso for a non-Mexican alien to present himself for employment to Farah, and so the "uniform" anti-alien policy can usually be applied uniformly. But as with any other policy having no business justification, it can be ignored whenever convenient. Farah's manner of administering the policy lends itself to such exceptions. The policy is not in writing, Jt. App. 29, nor

is it officially published or publicized. Thus an exception can be made, say for a Canadian alien, without even the beneficiary realizing his favored treatment.

Because a citizenship requirement has this necessary and inevitable effect of imposing special burdens on the identifiable nationality groups who are most oppressed at the time, it should not be permitted unless it meets the *Griggs* test of business necessity. Petitioner does not argue that a citizenship requirement is per se unlawful, for in some rare instances there may be bona fide national security or related business needs for it which Title VII permits an employer to recognize. But, as the Court said in *Griggs:*

> "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S. at 432.

No such relationship has been shown or even suggested to exist here.

Rather than attempt to justify its arbitrary prejudice against aliens, Farah attempts to excuse it by the hiring of large numbers of citizens of Mexican extraction. Because its work force is better than 90% Mexican-American, Farah claims that it cannot be held to be discriminating against Mexicans. That point is fundamental to Farah's entire case. This claim, however, must be rejected for a multitude of reasons.

First, of course, the percentage of Mexican-Americans at Farah says nothing about other nationality groups from

Chinese to Haitian. Farah's policy works against them as well. There are, admittedly, probably very few non-Mexican aliens to apply at Farah's plant, but the discriminatory potential against them nonetheless exists, and Farah has introduced no evidence to demonstrate that it has not had an adverse impact or that it may not at some time in the future have such an impact.

Second, even as to Mexicans there is no showing that Farah's work force would not have had an even higher percentage of persons of Mexican ancestry if alienage discrimination were dropped. The nature of the work force in this area of Texas is such that a high concentration of persons of Mexican descent is almost inevitable in low skilled, low wage employment such as that at the Farah plant.[25] The work force is not yet 100% of Mexican extraction. So long as one more Mexican might have been hired without the anti-alien policy, as is entirely probable, the policy is having the forbidden discriminatory effect and should be struck down. This extreme application of the *Griggs* principle may not be appropriate in every case; but here we are dealing with a totally arbitrary and unjustified employment barrier, and even a de minimis discriminatory effect should not be tolerated.

Third, even if Farah could show that it had given sufficient positive preference to Mexican-American citizens to fully offset its exclusion of Mexican aliens, its policy would be legally unacceptable under Title VII. This

[25]Newspaper accounts of Farah's employment practices have reported:

> "El Paso [where Farah's main plant and office are located] is attractive to the apparel industry because of its enormous pool of cheap Mexican-American Labor."

"Classic Labor-Organizing Drive Splits El Paso," N.Y. Times, Sept. 11, 1972, at p. 57, col. 1.

is not the first case in which an employer before this Court has attempted to excuse discrimination against some members of a minority group by hiring large numbers of others of that group. In *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971), the Court was confronted with a sex discrimination situation very similar to the national origin discrimination situation here. The employer in *Phillips* refused to hire women with pre-school children, but claimed that he was pure in the eyes of the law because he generously hired other women. Indeed 75-80% of those hired in the position applied for by Mrs. Phillips were women. 400 U.S. at 543. This was the so-called "sex-plus" defense —that it was permissible to refuse to hire women with certain characteristics, so long as the employer compensated for that discrimination by hiring enough other women. A unanimous Court rejected this defense out of hand, ruling that "sex-plus" is discrimination nonetheless under Title VII. The national origin discrimination in this case should be treated just as stringently. The whole notion that Title VII permits an employer to pick and choose among members of a minority under arbitrary criteria and "make up" for discrimination against one subgroup by employing individuals from another subgroup is contrary to the fundamental goal of Title VII to bring about employment of each individual on his own merits. The idea that one discrimination can be offset by another—that two wrongs make a right—is not consistent with Title VII and must be rejected here, as it was in *Phillips*.

Fourth, even if Farah hired 100% Mexican-Americans its policy would have an unlawful effect as to that group because it singles out the Mexicans most vulnerable to national origin discrimination for exclusion. Persons of Mexican origin living in the United States range from

the totally assimilated who are virtually unidentifiable as such to the newest immigrant fresh across the border. As mentioned above, the likelihood of national origin discrimination and the vulnerability to its decreases as assimilation increases. Farah's policy has the nasty effect of operating against a group at the most vulnerable end of this spectrum. The attainment of citizenship is a rough indicator of assimilation. If a person is a citizen, either he is native born and been exposed to American schooling and culture from childhood, or he has become naturalized. The requirements for naturalization are in large measure tests of the degree to which a person has adapted to mainstream America. Knowledge is required of the English language, American history and American government.[26] Thus, by the time an individual has acquired citizenship, he has made significant progress on his way to being absorbed in American society and to that extent, on the way to being free of discrimination. Moreover, he has acquired tools, most notably language skills, needed to make his way in America. On the other hand, as the most recent and least assimilated of foreigners, aliens are most likely to be "different."

It is most unlikely that Congress meant to adopt a rule under Title VII which protected those members of an ethnic group who least needed it and left exposed those who most needed the protection. Yet that is precisely the interpretation that Farah is seeking. Farah's attempt to excuse its discrimination against alien Mexicans by hiring citizen Mexicans should not be accepted by this Court. Because of the invidious effect of this policy, it should be viewed as aggravating the unlawfulness of Farah's actions—certainly not as excusing them.

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[26]See 8 U.S.C. §1423; Annual Rep. Immigration and Naturalization Service 20-21 (1971).

III

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) GUIDELINES ON DISCRIMINATION BECAUSE OF NATIONAL ORIGIN EXPRESSLY DECLARE ALIENAGE DISCRIMINATION TO VIOLATE TITLE VII.

This Court has recognized that the EEOC is an agency whose interpretations of Title VII are entitled to "great deference" because of the obvious agency expertise in reading ambiguities so as to best carry out the purposes of the statute. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971).

Here, the EEOC's position is plainly expressed in its Guidelines on Discrimination Because of National Origin, 29 C.F.R. §1606.1(d):

> "Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship, except that it is not an unlawful employment practice for an employer, pursuant to section 703(g) to refuse to employ any person who does not fulfill the requirements imposed [under statutes or executive orders dealing with national security]."

Since there is no national security justification for Farah's anti-alien policy, it obviously violates the EEOC guideline. The Court of Appeals recognized that the EEOC position

was contrary to its decision, but decided to reject EEOC arguments. Such a rejection of agency views is appropriate only if the agency is plainly wrong. Yet the court below could cite no clear legislative history or other source of authority for holding that the EEOC position was not a reasonable interpretation of the law. On this ground alone, the Fifth Circuit decision was clearly wrong and contrary to the views of this Court as laid down in *Griggs v. Duke Power Co., supra.* Petitioners will not burden the Court with a further elaboration of this point here, only because we understand that the EEOC position will be made known in an amicus brief to be filed by the United States.

IV

THE CONGRESSIONAL POLICY AGAINST PRIVATE EMPLOYMENT DISCRIMINATION BASED ON ALIENAGE IS LONG-STANDING AND ORIGINATED IN RECONSTRUCTION CIVIL RIGHTS LEGISLATION. THIS RECONSTRUCTION LEGISLATION, NOW EMBODIED IN 42 U.S.C. §1981, SHOULD BE DETERMINATIVE OF THE SCOPE OF TITLE VII AND, MOREOVER, PROVIDES AN ALTERNATIVE LEGAL GROUND FOR REVERSING THE COURT BELOW.

Title VII does not stand alone as a Federal legislative barrier to employment discrimination. It must be read and applied in conjunction with 42 U.S.C. §1981, originally enacted as part of the Civil Rights Act of 1866, as amended in 1870. Section 1981 provides that

> "All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ."

In order to understand the critical significance of §1981 to this case, it must first be made clear that §1981 bans private employment discrimination and that §1981 protects against discrimination based on alienage. Having established those points, we will then show that Title VII should reasonably be construed consistently with §1981. Even if Title VII is not so construed, the decision of the court below should nonetheless be reversed on the separate and independent authority of §1981.

A. SECTION 1981 BANS PRIVATE EMPLOYMENT DISCRIMINATION BASED ON ALIENAGE.

1. *Section 1981 applies to private employment discrimination.*

§1981 is a companion provision to 42 U.S.C. §1982, which protects minority rights to purchase and inherit property. Both provisions were originally enacted as part of a single statutory paragraph, §1 of the Civil Rights Act of 1866.[27] For many years this provision was thought

[27] §1 of the Civil Rights Act of 1866 provided:
That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens. 14 Stat. 27 (1866).

to apply only to state action, *Hodges v. United States*, 203 U.S. 1 (1906), and, with this limitation both §1981 and §1982 lay relatively dormant. This status was abruptly changed by this Court's 1968 decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), which exhaustively analyzed the legislative history of §1 of the 1866 Act and concluded that private, as well as state, action was covered by it.

It is true that *Jones v. Alfred H. Mayer Co., supra*, involved §1982, the property rights provision, rather than §1981. But there can be no doubt that the *Jones* decision applies to §1981 as well as §1982. As stated above, both §1981 and §1982 were originally intertwined in the same provision, §1 of the Civil Rights Act of 1866. The legislative history of both provisions as initially enacted is therefore indistinguishable. Indeed, the opinion of the Court in *Jones, supra*, per Mr. Justice Stewart, makes repeated references to Congressional discussions of non-property rights, which are now §1981 rights, in support of its conclusion that §1982 property rights are protected against private action. See 392 U.S. at 427, 429-30, 432. The entire thrust of the *Jones* decision is to adopt the view of the sponsor of the 1866 Act, that it would "break down *all* discrimination between black men and white men." Cong. Globe, 39th Cong. 1st Sess. 599 1866, quoted with approval in 392 U.S. at 432. (Emphasis added in opinion o fthe Court.)

It is also clear from the legislative history of the 1866 Act and the *Jones* decision that employment rights were among those protected by §1981. The portion of the Act now contained in §1981 does not mention employment as such, but it guarantees equal rights "to make and enforce contracts." There is ample evidence that the employer-

employee relationship, perhaps the most common and important contractual relationship that the average person has, was included.[28]

But the most telling evidence that §1981 protects against private employment discrimination after *Jones* lies in that decision's treatment of *Hodges v. United States*, 203 U.S. 1 (1906). *Hodges* was a case involving private employment discrimination and it had held that such private action was not covered by the 1866 Act. The Court in *Jones* noted that "the right to contract for employment [is] a right secured by 42 U.S.C. §1981," and proceeded to overrule *Hodges*.[29] This overruling of *Hodges*, a §1981 case, would hardly have been necessary or appropriate unless the Court recognized the determinative effect of its decision as to §1981.

The new status of §1981 as an equal employment adjunct to Title VII has become well established in the Courts of Appeals in the few years since *Jones*. The leading

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[28]As the *Jones* decision notes:

> "The Congressional debates (over the 1866 Act) are replete with references to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the permission of their former masters . . ." 392 U.S. 407.

Typical of these references are the following remarks of Congressman Windom in the debate over §1 of the 1866 Act:

> "Its object is to secure a poor, weak class of laborers the right to make contracts for their labor, the power to enforce payment of their wages, and the means of holding and enjoying the proceeds of their toil." Cong. Globe, 39th Cong. 1st Sess. 1159 (1866).

[29]In *Hodges* a group of white men had terrorized Negroes to prevent them from working in a sawmill. To quote from the *Jones* court's description of the case:

> "The terrorizers were convicted . . . of conspiring to prevent the Negroes from exercising *the right to contract for employment, a right secured by 42 U.S.C.* §1981." 392 U.S. at 442-43, n. 78.

case is *Waters v. Wisconsin Steel Works*, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970), where private union discrimination against blacks was held to violate §1981, both on the authority of *Jones* and on the Court of Appeals' own review of legislative history. The court concluded that:

> "Every indicia of Congressional intent points to the conclusion that §1981 was designed to prohibit private job discrimination." 427 F.2d at 483.

The same conclusion has been reached by the five other Courts of Appeals, all those that have considered the question.[30]

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[30] *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1087 (5th Cir. 1970), *cert. denied*. 401 U.S. 948 (1971); *Caldwell v. National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971), cert. denied. 405 U.S. 916 (1972); *Young v. International Tel. and Tel. Co.*, 438 F.2d 757 (3rd Cir. 1971); *Brady v. Bristol-Myers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Brown v. Gaston County Dyeing Mach. Co.*, 457 F.2d 1377, 1379 (5th Cir. 1972); *Williamson v. Bethlehem Steel Corp.*, 468 F.2d 1201, 1204 n.2 (2d Cir. 1972) (dictum). There are no conflicting Court of Appeals decisions. Also in accord are *Dobbins v. Electrical Workers Local 212, IBEW*, 292 F.Supp. 413 (D.Ohio 1968) in the Sixth Circuit and *League of Academic Women v. Regents of the University of California*, 4 E.P.D. ¶7878 (N.D. Calif. 1972) (dictum) in the Ninth Circuit.

Other useful District Court analysis reaching the same conclusion is set out in *Pennsylvania v. Operating Engineers, Local 542*, 5 E.P.D. ¶8004, at 6688-6689 (E.D.Pa. 1972); *Sidberry v. Stage Employees, IATSE, Local 307*, 5 E.P.D. ¶7976 (E.D. Pa. 1972); *Cofield, v. Goldman, Sachs & Co.*, 5 E.P.D. ¶8492 (S.D.N.Y. 1972); *Tolbert v. Daniel Cons. Co.*, 4 E.P.D. ¶5108 (D.S.C. 1971); *Johnson v. Goodyear Tire & Rubber Co.*, 5 E.P.D. ¶8056 at 6854-55, 6858 (S.D. Tex. 1972); *Tramble v. Converters Ink Co.*, 4 E.P.D. ¶7873 (N.D. Ill. 1972); *Page v. Curtiss-Wright Corp.*, 4 E.P.D. ¶7564 (D.N.J. 1971). The only unreversed District Court opinion to the contrary is *Smith v. North American Rockwell Corp.* 50 F.R.D. 515 (D. Okla. 1970). See generally, R. Larson, The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment, 7 Harvard Civil Rights-Civil Liberties L. Rev. 57 (1972).

2. *Section 1981 protects against discrimination based on alienage.*

The plain language of §1981—"*All persons* shall have the same rights to make and enforce contracts . . . as white *citizens* . . ."—rather obviously indicates a purpose, among others, to assure that noncitizens, *i.e.*, aliens, will receive the same treatment as citizens. The legislative history of the provision thoroughly confirms what the plain language indicates.

When originally enacted in §1 of the Civil Rights Act of 1866, §1981 differed from the present law in that the 1866 Act, quoted at note 27, *supra*, protected only "persons born in the United States and not subject to any foreign power," and thus expressly excluded aliens. This coverage was sharply modified by civil rights amendments of 1870. The 1870 amendments reenacted and reaffirmed the 1866 Act, but they also modified a portion of it to extend partial protection to "all persons within the jurisdiction of the United States," which is the coverage of the present §1981. The purpose of this modification was explained by its sponsor, Senator Stewart, when he first introduced an earlier version of the 1870 Amendments.

> "The original civil rights bill protected all persons born in the United States in the equal protection of the laws. This bill extends it to aliens, so that all persons who are in the United States shall have the equal protection of our laws. It extends the operation of the civil rights bill, which is well known in the Senate and to the country, to all persons within the jurisdiction of the United States. That is all there is in the bill." Cong. Globe, 41st Cong., 2d Sess. 1536 (1870).

The 1870 amendment was not comprehensive in extending the 1866 Act to aliens. As Senator Stewart went on to explain:

> "It has nothing to do with property or descent. We left that part of the law out; but it gives protection to life and property here. The civil rights bill, then will give the United States Courts jurisdiction to enforce it." *Ibid.*

The full text of the sections 16-18 of the 1870 amendments are set out in the margin.[11] As Senator Stewart indicated,

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[11] "Sec. 16. AND BE IT FURTHER ENACTED, That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void.

"Sec. 17. AND BE IT FURTHER ENACTED, That any person who, under color of any law, statute, ordinance, regulation or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

"Sec. 18. AND BE IT FURTHER ENACTED, that the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act."

the rights to hold and inherit property contained in §1 of the 1866 Act are not included and therefore were not extended to aliens. But the right of importance to this case, the right "to make and enforce contracts" is clearly included.[32]

This dichotomy in the treatment of employment rights as distinguished from property rights in the 1870 amendments can easily be understood in light of traditional common law attitudes. The rights of aliens to hold property were traditionally fettered.[33] As recently as 1923 this Court upheld a state law denying aliens the right to hold any interest in real property, even a leasehold. *Terrace v. Thompson*, 263 U.S. 197 (1923). In so doing the *Terrace* decision drew a distinction between an alien's "right to work for a living in the common occupations of the community," which admittedly was protected by the Fourteenth Amendment, and the right to own real property, which was relatively unprotected, a distinction remarkably similar to that in the 1870 amendments.[34]

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[32]This distinction in the treatment of aliens between property rights and other rights has been carried forward to the present day. The separation of §1 of the 1866 Act into §§1981 and 1982 stems from a statutory codification undertaken during 1866 to 1873. See 14 Stat. 74 (1866); 18 Stat. 113 (1874). The codifiers, who must have been well aware of the civil rights legislation being enacted contemporaneously with their labors split §1 of the 1866 Act into R.S. 1977 (now §1981) and R.S. 1978 (now §1982). The former provision applying to non-property rights protects "all persons," while the property rights protection of the latter applies only to "citizens."

[33]See *Phillips v. Moore*, 100 U.S. 208, 212 (1879).

[34]The real property right at issue in *Terrace* was a proposed leasehold of farmland to an alien Japanese farmer. After acknowledging the protected status of the right to work for a living, the Court ruled that the right was not controlling:

"In the case before us, the thing forbidden is very different. It is not an opportunity to earn a living in common occupa-

Similar strong feelings regarding property were undoubtedly prevalent a half century earlier when the 1870 amendments were enacted, and just as Mr. Justice Butler in *Terrace* could find that the right to work was protected by the Fourteenth Amendment more than the right to own real estate, so the Congressmen in office when the Fourteenth Amendment and related civil rights acts were enacted could share a similar feeling.

The significance of §1981 as a protector of the employment rights of aliens has long been recognized by this Court. Thus in *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), §1981 was relied upon in striking down laws used to deny Chinese persons the right to operate laundries. And in *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 420 (1948), the Court expressly relied upon §1981 in striking down state laws restricting fishing rights of aliens. See *Truax v. Raich*, 239 U.S. 33, 39 (1915). As might be expected, prior to *Jones v. Mayer*, supra, only state action was challenged under §1981. But subsequent to *Jones*, lower Federal courts have begun applying §1981 to protect the private employment rights of aliens. The most important such opinion is that of Judge Singleton in *Guerra v. Manchester Terminal Corp.*, 350 F.Supp. 529 (S.D. Tex. 1972), where the court thoroughly and extensively analyzed the legislative history of the 1866 and 1870 Acts before holding that §1981 barred private union discrimination against aliens. See *League of Academic Women v. Regents of the Univ. of Calif.*, 4 E.P.D. ¶7878 (N.D. Calif 1972).

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tions of the community, but it is the privilege of owning or controlling agricultural land within the State. The quality and allegiance of those who own, occupy and use the farm lands within the borders are matters of highest importance and affect the safety and power of the State itself." 263 U.S. at 197.

B. TITLE VII SHOULD BE INTERPRETED TO PROTECT THOSE EMPLOYMENT RIGHTS PROTECTED BY §1981.

This discussion of §1981 is of primary importance here in demonstrating the longstanding Congressional solicitude for the employment rights of aliens and the policy against employment discrimination based on alienage. It confirms that aliens are a traditionally protected group under antidiscrimination legislation. And it strongly argues for an interpretation of Title VII that would be in keeping with this longstanding tradition.

> "Statutory interpretation requires more than concentration upon isolated words; rather consideration must be given to the total corpus of pertinent law . . . " Boys Mkts. Inc. v. Retail Clerks Union, 398 U.S. 235, 250 (1970).

The trend of decisions in this Court over the past several decades indicates a growing awareness of the vulnerability of aliens and their need for civil rights protection. *Compare Heim v. McCall*, 239 U.S. 175 (1915), *with Takahashi v. Fish & Game Comm.*, 334 U.S. 410 (1948), *with Graham v. Richardson*, 403 U.S. 365 (1971). It should not be assumed that Congress in 1964 meant to move in the opposite direction and enact civil rights legislation less protective of aliens' rights than the 1870 Act.

Furthermore, given the existence of §1981 as a federal law barring alienage discrimination, the issue regarding Title VII becomes not whether aliens will be protected but rather how they will be protected; that is, will victims of alienage discrimination such as Mrs. Espinoza be able

to take advantage of the conciliation procedures of the Equal Employment Opportunity Commission and the other fully articulated administrative procedures of Title VII, or will they be forced to commence private actions in Federal court under §1981 in every case. There is no benefit to anyone—employer, employee, government or the public at large—in forcing an aggrieved employee to pursue a §1981 remedy, except the interest of an employer in depriving the employee, who will ordinarily not be able to afford private counsel, of the assistance of the Equal Employment Opportunity Commission in prosecuting his or her claim. That employer interest is hardly worthy of judicial protection. The overall pattern of equal employment protective legislation calls for an interpretation of Title VII to give it coverage consistent with §1981 so that Title VII and the procedures established under it may be most effectively put to use.

C. SECTION 1981 PROVIDES AN ALTERNATIVE BASIS FOR REVERSING THE COURT OF APPEALS AND REINSTATING THE RELIEF ORDERED BY THE DISTRICT COURT.

If, however, Title VII is construed not to cover alienage discrimination, then §1981 takes on a different significance for this case. It provides an independent basis for reversing the Fifth Circuit and reinstating the relief ordered by the District Court, since respondent Farah's alienage discrimination clearly violates §1981.

The petitioner does not seek primary relief under §1981 because her rights under it may be to some extent be

dependent upon the interpretation given Title VII by this Court. While all Courts of Appeals to consider the question have explicitly ruled that §1981 establishes a right of action against private employment discrimination, see p. 30 supra, the courts are divided as to the relative priority of that right and the Title VII right where the two overlap. Some courts have held that §1981 is available only when there is a good reason for bypassing Title VII, *Waters v. Wisconsin Steel Works*, 427 F.2d 476 (7th Cir.) *cert. denied*, 400 U.S. 911 (1970), and others have held that §1981 is always available. *Caldwell v. National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972).[35] Petitioners have not raised that issue and do not seek to have it resolved in this case. If there is an overlap between Title VII and §1981 as to alienage discrimination — and petitioners of course strongly argue that there is — petitioners seek only Title VII relief. But if this Court should find that there is no overlap, because Title VII does not cover alienage discrimination, then petitioners' right to relief under §1981 becomes paramount and she becomes entitled to it no matter which Court of Appeals view of §1981 is adopted. Therefore, while petitioner does not urge §1981 as a primary basis for relief, she does ask that her §1981 rights be recognized to a sufficient extent to protect her in the event that her Title VII claim is rejected.

[35]The precise relationship between §1982 and the fair housing provisions of the Civil Rights Act of 1968 are similarly not yet fully resolved. See Tillman v. Wheaton-Haven Recreation Assoc., 93 Sup. Ct. 1090 (1973).

IV.

THE FIFTH CIRCUIT DECISION IS INCONSISTENT WITH CONTEMPORARY PUBLIC POLICY TO PROTECT ALIENS EXPRESSED BOTH IN DECISIONS OF THIS COURT AND IN FEDERAL LEGISLATION.

A. RECENT SUPREME COURT DECISIONS

Supreme Court decisions in *Takahashi v. Fish and Game Comm.*, 334 U.S. 410 (1948) and *Graham v. Richardson*, 430 U.S. 365 (1971) have established that classifications based on alienage are inherently suspect and subject to special judicial scrutiny. Writing for the Court in *Graham*, Mr. Justice Blackmun emphasized that

> "Aliens as a class are a prime example of a 'discrete and insular minority . . . for whom . . . heightened judicial solicitude is appropriate.'" 403 U.S. at 372.

This principle had not been stated so forcefully before, but as noted above, it had long been followed by the Court insofar as the employment rights of aliens are concerned.[36] The earliest major case involving alien discrimination is the oft cited *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). That decision laid the foundation of the doctrine later ennunciated in *Truax v. Raich*, 239 U.S. 33, 41 (1915), that the right to work in common occupations is "the very essence" of the freedom guaranteed by the Fourteenth Amendment and that aliens are fully entitled to be protected in exercising that important right.

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[36]See p. 34, supra.

To the extent that *Graham* and its predecessors are based on the Fourteenth Amendment they are not binding as to Title VII, but it should be obvious that the same considerations which underlie the Court's definition of suspect classes under the Constitution also apply to Congress' definition of protected classes under Title VII. Race is the basic protected class in both instances, and in both instances other groups with similar vulnerability have also been brought in. While exact parallels between the scope of the Fourteenth Amendment and Title VII are not to be expected, certainly the "judicial solicitude" which supported the *Graham* decision ought not be transformed into judicial harshness when the courts turn to Title VII, which is the private employment analog of the Fourteenth Amendment. But the Fifth Circuit decision is plainly as insolicitous of the interests of aliens as it can be. Petitioners here ask only that an ambiguity in a statutory provision (the phrase "national origin" in Title VII) be construed so as to be protective of aliens, and that construction has been amply justified in terms of the language and purpose of the Act and its legislative history. If the policy and attitudes supporting *Graham* are given any sway at all in interpreting Title VII, discrimination against aliens would surely be viewed as a form of forbidden national origin discrimination.

Moreover, this line of Fourteenth Amendment decisions has direct relevance to petitioners rights under 42 U.S.C. §1981.[37] The civil rights amendments of 1870, from which §1981 was in part derived, were enacted shortly after the Fourteenth Amendment became law and are recognized as as an aspect of legislative implementation of that

[37]See pp. 26-37, supra.

amendment.[38] The growing recognition of aliens as a protected class under the Fourteenth Amendment gives added weight to petitioners claim that §1981 should be interpreted to protect her private employment rights, if there were any doubt as to that.[39]

B. FEDERAL IMMIGRATION LEGISLATION

The other Federal legislation most directly affected by the decision in this case is the immigration laws. These laws, as amended in 1965, express a clear concern with assuring the employability of aliens. "Aliens who are paupers, professional beggars, or vagrants" are excluded from admission to the United States (8 U.S.C. §1182(a)(4)), as are aliens who are likely to become public charges. (8 U.S.C. §1182(a)(15)). Aliens are to be deported who have "within five years of entry become a public charge from causes not affirmatively shown to have arisen after entry (8 U.S.C. §1251(a)(8)), and an alien likely to become a public charge may be admitted only upon the posting of a bond (8 U.S.C. §1183). Most importantly, 8 U.S.C. §1182(a)(14) excludes aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor unless the Secretary of Labor has determined that (a) there are not sufficient workers in the United States at the appropriate time and place who are "able, willing, qualified and available" to perform such labor and that

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[38]See Waters v. Wisconsin Steel Works, 427 F.2d 476, 482 (7th Cir.), cert. denied, 400 U.S. 911 (1970).

[39]Of course, constitutional authority for Congressional protection of aliens need not be based on the Fourteenth Amendment alone. The plenary Federal power over immigration gives Congressional ample authority to support any legislation related to aliens and their treatment. See *Graham v. Richardson*, 403 U.S. at 376-380.

(b) "the employment of such aliens will not adversely effect the wages and working conditions of the workers in the United States similarly employed . . . " The conclusion is inescapable that aliens who are admitted into the United States are expected to be employed.

This Court, in *Graham v. Richardson*, 403 U.S. 365, 376-380 (1971), recognized that the indirect, but very real, relationship between Federal immigration policy and the administration of welfare programs required that state welfare officers not impose any special restraints on aliens. Thus immigration legislation, which said nothing on its face about welfare, was read to indicate a Congressional intent to bar state laws which might harm aliens in a way inconsistent with immigration policy.

Congressional immigration policy should also be read to indicate a Congressional intent to bar private actions which would frustrate immigration policy even more directly than the state laws in *Graham*. The legal doctrines involved are, of course, different. The state laws in *Graham* were invalidated because they conflicted with Congressional policy. In this case rather, the immigration policy must be read as an indicator of the Congressional policy underlying Title VII. Nonetheless, the basic principle is the same. The Congressional immigration policy should always be taken account of when laws impinging upon it are construed, and, to the extent possible those laws should be construed in accord with immigration policy. Here that objective can easily be achieved by reading Title VII to bar alienage discrimination. To rule otherwise, would needlessly undercut the objective of having aliens employed.

C. FEDERAL CIVIL SERVICE LEGISLATION

The one area of Federal law which suggests an unfavorable Congressional attitude toward the employment of aliens is that covering the Federal civil service. For many years, regulations of the United States Civil Service Commission have imposed a barrier to the employment of noncitizens.[40] This rule was originally adopted without Congressional authorization, but at some subsequent time Congress gave support to the Commission's policy in an odd way. No affirmative legislation was enacted to support this discrimination against aliens. Rather, for some years a single appropriations bill each year has contained a provision similar to the following:

> "During the current fiscal year no part of any appropriation contained in this *or any other bill* shall be used to pay the compensation of any officer or employee of the Government of the United States . . . unless such person (1) is a citizen of the United States [or falls within enumerated categories of exceptions]." P.L. 91-439, §502, 84 Stat. 902 (1970) (Emphasis added.)

Respondent Farah, both in its briefs below and in its opposition to certiorari laid great emphasis on these provisions as demonstrating Congressional intent to permit alienage discrimination. However, it is unreasonable for many reasons to attribute any great significance to these provisions in determining Congressional intent.

These provisions are adopted in a fashion which assures the minimum possible legislative attention or con-

[40] 5 C.F.R. §338.101 (1973).

sideration. They do not appear in affirmative legislation but rather as a technical provision buried at the back of an appropriations bill. The provision does not appear in every appropriations bill, but only in one such bill each year.

Moreover, the Congressional provision is nowhere near as sweeping or rigid as Farah's policy. The provision excepts all of the following:

(1) persons who "owe allegiance to the United States"

(2) resident aliens from Poland or the Baltic countries

(3) "citizens of the Philippines," and

(4) "nationals of those countries allied with the United States in the current defense effort."

Other statutory provisions grant additional broad exceptions. For example, the entire Department of Defense has been exempted from this restriction. P.L. 92-204, §703, 85 Stat. 726 (1971). See P.L. 91-382, Administrative Provisions, 84 Stat. 823 (1970) partial exemption for Library of Congress).

If this provision, with its incredible potpourri of exceptions, were presented for open Congressional debate and consideration, we can only speculate upon the outcome. But that is not the issue here. The only question here is whether the provisions should be taken to reflect Congressional intent under Title VII. It would be an absurd distortion of legislative history to give such significant effect to this odd bit of backdoor legislation.

In any event, there are justifications for restricting alien employment in government which are wholly inap-

plicable to private employment. A combination of loyalty considerations and the traditional political interest in preserving the government payroll for constituents (aliens as nonvoters are, of course, the only non-constituents in America) provides an explanation for these restraints on public employment. *Wong v. Hampton*, 333 F.Supp. 527 (N.D. Calif. 1971). Such justifications are of very doubtful constitutional validity and the civil service restrictions are now under constitutional attack. See, *Jalil v. Hampton*, 460 F.2d 923 (D.C. Cir. 1972), *cert. denied*, 93 Sup. Ct. 112 (1972); *Faruki v. Rogers*, 5 E.P.D. ¶8015 (D.C. Cir. 1972). Whatever the outcome of that attack, it should be clear that the rationale behind civil service restrictions has no relevance to private employment and there is no reason to assume that Congressional action affecting the private sector was intended to be similarly restrained.

CONCLUSION

For the reasons indicated, the decision of the Court of Appeals for the Fifth Circuit should be reversed and the case remanded to the District Court for the granting of appropriate relief.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing Brief of Appellee was served by mail upon Kenneth R. Carr, Esq., P.O. Box 9519, El Paso, Texas 79985, this ____ day of June, 1973.

George Cooper